SIM KIE CHON v. SUPERINTENDENT OF PUDU PRISON & ORS.

[S.C. (Abdul Hamid C.J. (Malaya), Syed Agil Barakbah & Wan Hamzah S.C. JJ.) July 22 & 23, 1985]

[Ipoh – Supreme Court Civil Appeal No. 234 of 1985]

Practice and Procedure – Application to strike out statement of claim and dissolution of order for stay of execution – No reasonable cause of action disclosed – Commutation of death sentence – Function of Pardons Board – Prerogative of mercy – Non-justiciable – Federal Constitution, art. 42(1) – R.H.C. 1980, O.18 r.19.

Constitutional Law – Prerogative of mercy – Function of Pardons Board – Power of Yang di-Pertuan Agung – Non-justiciable – Federal Constitution, arts. 8 & 42(1).

This was an appeal from the decision of the High Court ordering that the appellant's statement of claim be struck out and the order for stay of execution dissolved. The appellant had been sentenced to death and his appeal had been dismissed by the Federal Court. The Pardons Board had tendered its advice to the Yang di-Pertuan Agong and no pardon, reprieve or respite had been granted. In his statement of claim the appellant had alleged that the Pardons Board had not considered the petition for mercy properly. It was also alleged that by the failure to commute the sentence the Pardons Board had acted unconstitutionally contrary to Article 8 of the Federal Constitution.

Held: (1) the learned Judge was right in holding that there was disclosed no cause of action. There was no merit in the contention of the appellant for it is not the function of the Pardons Board to commute a death sentence. Its function is merely to tender advice;

(2) in the present case although the Pardons Board tendered advice to the Yang di-Pertuan Agong clearly the Yang di-Pertuan Agong himself exercised the power in accordance with Article 42(1) of the Federal Constitution read with regulation 29 of the Essential (Security Cases) Amendment Regulations, 1975. Such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review;

(3) a sentence of death imposed by a court of law on a convicted person who has since exhausted his legal remedies will not be carried out only if the Yang di-Pertuan Agong or the Ruler of a state or the Yang di-Pertuan Negeri as the case may be, commutes the death sentence in exercise of the powers under Article 42 of the Federal Constitution. If there is to be stay of such execution, the power to stay is only exercisable by the Yang di-Pertuan Agong or the Ruler of a state or the Yang di-Pertuan Negeri, as the case may be;

(4) a decision made pursuant to an exercise of royal prerogative of mercy cannot be varied or confirmed by the courts there being no jurisdiction to do so. Proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable;

(5) there is therefore no justification to interfere with the learned Judge's decision in this case. Both the order to strike out the statement of claim and to dissolve the order for stay of execution are confirmed.

Cases referred to:

(1) *Attorney-General of Duchy of Lancaster* v. *L & N.W. Railway Co.* [1892] 3 Ch. 274.

(2) *Council of Civil Service Unions & Ors.* v. *Minister for the Civil Service* [1984] 3 All E.R. 935.

(3) *Public Prosecutor* v. *Lim Hiang Seoh* [1979] 2 M.L.J. 170.

(4) *G. Kista Gowd and Another* v. *State of Andhra Prudesh* 1975 I.L.R. Andhra Pradesh 771.

(5) *Michael De Freitas* v. *George Ramoutar Benny & Ors.* [1976] A.C. 239, 247.

(6) *Chiow Thiam Guan* v. *Superintendent of Pudu Prison and the Government of Malaysia* [1983] 2 M.L.J. 116.

(7) *Hanratty and Another* v. *Lord Butler of Saffron Walden* (1971) 115 Solicitors Journal p. 386.

SUPREME COURT.

Karam Singh (*K. Siva Segara* with him) for the appellant.

Mohd. Rauff bin Nabi Bux (Senior Federal Counsel) for the respondents.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): This is an appeal against the decision of Harun J. given at the High Court, Kuala Lumpur, ordering that the appellant's statement of claim be struck out and the order for a stay of execution be dissolved. There is also a motion for a stay of execution.

The order to strike out the statement of claim and the dissolution of the order for the stay of execution were made by the learned Judge after hearing an application by the respondents/defendants, on a certification of urgency, on grounds that –

(1) the matters raised in the said writ and the accompanying Statement of Claim are non-justiciable and/or outside the jurisdiction of this Honourable Court;

(2) the Honourable Court has no jurisdiction to grant a stay of execution on a warrant of Execution on a Sentence of Death issued against the Plaintiff on May 18, 1985;

(3) the purported action of the Plaintiff is misconceived in that the death sentence pronounced by the High Court and confirmed by the Federal Court is final and conclusive and cannot in any event be reversed.

In his judgment the learned Judge has made a finding that there is no cause of action.

At the hearing before us the appellant contended that there is disclosed from the statement of claim a triable issue and the learned Judge should not therefore have struck out the statement of claim.

The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 19 of the Rules of the High Court 1980: "the summary procedure under this Rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'." (*Attorney-General of Duchy of Lancaster* v. *L. & N.W. Railway Co.*[1]) (*Supreme Court Practice* 1985).

On an application to strike out the statement of claim and dismiss the action, the right course for the court is to strike out the claim if it is satisfied that a claim does not disclose a reasonable cause of action.

In the instant case we are satisfied that the learned Judge was right when he held that there was disclosed no cause of action.

With respect to the statement of claim before the Court the only paragraph that purports to raise an issue is para 4. It contains an allegation that the Pardons Board did not consider the petition for mercy properly. The contents of paragraphs 5 and 6 are in the nature of particulars to support the allegation contained in paragraph 4. In paragraph 7 of the statement of claim it is alleged that by the failure to commute the sentence, the Pardons Board has acted unconstitutionally contrary to Article 8 of the Constitution.

It is the appellant' contention that the inequality lies in the fact that while the Board commuted the death sentence of Mokhtar Hashim it did not do the same in respect of the appellant. In our view there is no merit in the contention for it is not the function of the Board to commute a death sentence. Its function is merely to tender advice.

Under Article 42(1) of the Federal Constitution it is provided that:

"(1) The Yang di-Pertuan Agung has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territory; and the Ruler or Yang di-Pertuan Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State."

In the present case though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly Yang di-Pertuan Agong himself exercised the power in accordance with Art. 42(1) above read together with regulation 29 of the Essential (Security Cases) (Amendment) Regulations, 1975. In our view such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review. (See *Council of Civil Service Unions and others* v. *Minister for the Civil Service*[2]). Basically it is an executive power of the nature described by Suffian, L.P. delivering the Judgment of the Court in *Public Prosecutor* v. *Lim Hiang Seoh*[3]. Sitting with 4 other judges, his Lordship said:

"When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power as in Jamaica, *Hinds* v. *The Queen.*"

(See also *G. Kista Gowd and Another* v. *State of Andhra Pradesh*[4]).

We hasten to add that we subscribe to what had been stated in *Michael De Freitas* v. *George Ramoutar Benny and Others*[5] *(de Freitas case)* to the effect that "Mercy is not the subject of legal rights. It begins where legal rights end."

In our judgment, a sentence of death imposed by a court of law on a convicted person who has since exhausted his legal remedies will not be carried out only if the Yang di-Pertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, commutes the death sentence in exercise of the powers under Article 42 of the Federal Constitution. If there is to be a stay of such sentence, the power to stay is only exercisable by the Yang di-Pertuan Agong or the Rules of a State or the Yang di-Pertuan Negeri, as the case may be.

In *Chiow Thiam Guan* v. *Superintendent of Pudu Prison and the Government of Malaysia*[6] it

was held, with reference to an application for stay of execution pending appeal, that:

"Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *de Freitas case* – 'Mercy is not the subject of legal rights. It begins where legal rights end.' Any stay of execution would be only an extension of the prerogative of mercy, exercisable only by His Majesty the Yang di-Pertuan Agong in accordance with Article 42 of the Constitution."

In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and the death sentence confirmed. Mercy begins but mercy is not a legal right. In the case of *Chiow Thiam Guan* v. *Superintendent of Pudu Prison and the Government of Malaysia* (*supra*), it was held that a decision made pursuant to an exercise of a royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang di-Pertuan Agong or the Rule of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter. (See *Hanratty and Another* v. *Lord Butler of Saffron Walden*[7]).

In view of the foregoing, we see no justification to interfere with the learned Judge's decision. Accordingly, the appeal is dismissed. Both the order to strike off the statement of claim and to dissolve the order for stay of execution are confirmed.

In the light of our decision, the motion for stay of execution is dismissed.

The deposit of $500/- paid into Court by the appellant shall be paid out to the respondents as costs.

Appeal dismissed.

Solicitors : *Karam Singh Veriah & Co.*

SAW POH WAH v. OOI KEAN HANG & ANOR. (ASIA INSURANCE CO. LTD. as THIRD PARTY)

[O.C.J. (Syed Agil Barakbah J.) January 16, 1982]

[Alor Star – Civil Suit No. 528 of 1977]

Tort – Negligence – Claim by lorry attendant against driver and owner for damages – Consent judgment against defendants – Defendants claiming indemnity against insurer – Whether insurer liable.

Insurance law – Consent judgment for plaintiff against defendants – Defendants claiming indemnity against insurers – Terms of policy – Coverage – Exceptions – Construction – Whether insurer liable to indemnify defendants – Road Traffic Ordinance 1958, ss. 2, 74(i) & 75.

The plaintiff claimed against the defendants for damages for personal injuries and consequential losses suffered by him due to the negligence of the first defendant as the servant or agent of the second defendant in driving a motor-lorry. The plaintiff was at all material times employed by the second defendant, the registered owner of the vehicle, as an attendant. The first defendant was employed by the same as driver. By consent the plaintiff obtained judgment against the defendants for the sum of $65,000/- in damages together with interest and costs to be taxed. The defendants filed a claim against the Third Party, the insurers of the lorry, for whatever damages and costs which the defendants may be called upon to pay the plaintiff.

The said motor lorry had a "C" Carrier licence and was insured with Third Party Risks. Section II of the insurance policy dealt with "Liability to Third Parties". The issue before the Court depended on the true construction of Section II and the exceptions (ii) and (iii) of the policy.

Held: (1) the liability of the driver, the first defendant, to the injured employee, the plaintiff, was covered by the insurance policy by virtue of Section II paragraph 2;

(2) the Third Party should therefore indemnify the defendants on the judgment entered for the plaintiff and pay the costs of third party proceeding to the defendants.

[*Editorial Note:* The third party appealed against the above decision to the Federal Court, *vide* F.C.C.A. No. 32 of 1982. The appeal was heard before Abdul Hamid C.J. (Malaya), Wan Suleiman and Abdoolcader F.JJ. on November 21, 1984. Counsel for the appellant were Messrs. Khoo Eng Chin and Ong See Seng, while Mr. Lim Ewe Hock appeared for the respondents. The Federal Court allowed the appeal of the insurer, without delivering a written judgment which undoubtedly would be of great interest to the legal profession and insurance companies. The Federal Court held that there was no cross-appeal by the respondents against the trial judge's finding that the plaintiff (the lorry attendant) was not a passenger. As such the learned trial judge should have held that the exceptions to Section II of the Policy applied. Hence, the insurer was not liable to indemnify the defendants.]